sary to go to them; but I am very clearly of opinion that there is enough on the face of this deed to decide the case without the English authorities at all. If the words "during the marriage" had not occurred either in the destination by the husband or in that by the wife, I do not see that there could have been any difficulty in holding that what was disposed of on both sides was what should be acquired during the marriage. That being so, all that we require is to look to whether there is not an apparent reason for these words being used in the conveyance by the husband which does not apply to the conveyance by the wife. I think this is quite sufficiently accounted for by holding that the husband wanted to limit the estate dealt with by him—he wanted it not to be indefinite but to be fixed; and he stipulated therefore that it should be calculated as at the date of the dissolution of the marriage, so that he might spend what he liked during his life and the provision might only affect what was left at his death. That sufficiently accounts, I think, for the words which occur in the one conveyance and not in the other. All reasons of expediency are against the other construction—that the wife was to be restricted in such a way that everything, however valuable, which might come to her after the dissolution of the marriage was to be entirely tied up, so that, although she married again, she could not regulate or dispose of the means that had thus come to her. As the result of the whole matter, therefore, I agree with your Lordship. I have no doubt but that whatever has come to the wife after the marriage is dissolved is her own.

LORD MURE—I go entirely on the words of the contract, for it appears to me, without reference to the English authorities, that these words are sufficient of themselves to lead to the conclusion your Lordship has arrived at. The dissolution of the marriage is distinctly fixed as the period with reference to which the husband's obligations are to be ascertained; and when the wife comes to undertake her counter-obligations I see no reason to suppose that the same period would not be taken as regards the time up to which the wife's acquisitions were to be held to be conveyed over to the trustees. The presumption is that the same period would be fixed; and unless the words used are such as clearly extend the provision to acquisitions made by her after the dissolution of the marriage, I should not be disposed so to interpret them. But here the words used clearly admit of an opposite construction. One of the provisions is that the fund, whatever it may be, is to be divided as the husband shall direct; and this implies that Mr Wardlaw during his life was to be aware of the amount of the estate that was to be apportioned by him. Then there is the anxious exclusion of the *jus mariti* and right of administration as regards the property which was to come through the wife; and that is important as showing that the property coming through her which was to be made over to the trustees was the same estate as that from which the *jus mariti* was excluded, because that exclusion could only be necessary as regarded property acquired during the husband's life. So that if the husband is to divide the funds among the children—and these are the same funds as those from which his *jus mariti* has been excluded—the words cannot, I think, be held to apply to funds to which his wife has succeeded long after his death.

The Court answered the first question in the negative and the second in the affirmative.

Counsel for Mrs Wardlaw—Kinnear—G. Burnet. Agents—Macandrew & Wright, W.S.

Counsel for the Marriage-Contract Trustees—M'Laren. Agent—R. Ainslie Brown, Solicitor.

Wednesday, July 7.

SECOND DIVISION.

SPECIAL CASE—MITCHELL'S TRUSTEES AND OTHERS

Succession—Protected Succession—Fee and Liferent—Trust—Technical Words in Directions to Trustees.

Words used by a truster in directing his trustees to execute a certain destination of his estate are to be construed, not technically, but in accordance with the testator's intention, and the trustees are bound to execute the deeds in terms which will carry out that intention, although the words used by the testator would, if contained in a direct conveyance by him, be construed in a strictly technical manner.

A testator directed his trustees to hold his estate until the youngest of his children should attain majority. After a clause of survivorship the deed bore that "on the marriage of any of my daughters it is my wish that a sum not exceeding one-third of the estimated amount of their share of my estate shall be applied towards their outfit and establishment at the time, and that the remainder shall be settled upon themselves in liferent and the children of their marriage in fee, the *jus mariti* of their husbands being excluded therefrom." When the youngest child attained majority several of the daughters were unmarried, and one was a widow with several children. *Held* that the former were entitled to immediate and absolute payment of their shares, and that the latter was entitled to one-third of her share in fee, and that the remaining two-thirds fell to be settled on her in liferent allenarly and her children in fee.

James Mitchell of Auchinleck, in the county of Forfar, died on 31st October 1858, leaving a trust-disposition and settlement whereby he conveyed to trustees, for purposes therein mentioned, his whole means and estate, heritable and moveable. The settlement was duly recorded on 3d December 1858. The third purpose of this settlement was in those terms—"*Third*, in regard to the free residue of my estate, I hereby direct and appoint my said trustees to retain the same for behoof of the children lawfully procreated or to be procreated of my body, and that in such proportions as I may appoint by any writing under my hand at any time of my life, and failing any such appointment, then for behoof of my said children equally between and among them, share and share

alike, with this exception, that my eldest son shall be entitled to two shares, the shares of each to be payable at the first term of Whitsunday or Martinmas after the youngest of my children shall have attained to majority: . . . And on the marriage of any of my daughters, it is my wish that a sum not exceeding one-third of the estimated amount of their share of my estate shall be applied towards their outfit and establishment at the time, and that the remainder shall be settled upon themselves in liferent and the children of their marriage in fee, the *jus mariti* of their husbands being excluded therefrom: . . . And I do hereby direct and appoint that the interest accruing on the principal of the shares of my children shall be applied generally in and towards their maintenance, education, and support, in so far as shall be considered necessary by my said trustees and the tutors and curators hereinafter appointed: Declaring that as respects those of my children who may be of age at the time of my death, my said trustees shall pay to them the interest accruing on their shares half-yearly, at the terms of Whitsunday and Martinmas, and the same to my other children as they successively attain to majority, the *jus mariti* of the husbands of such of my daughters as may be married being excluded from the interest to the same extent as is before provided in regard to the principal: And I do hereby empower my said trustees to advance such part of the shares of my sons as they and the said tutors and curators may deem advisable (but not exceeding one-third of the estimated amount), with a view to fitting them out or promoting their advancement in the world: Declaring, as it is hereby expressly provided and declared, that the trust hereby constituted shall subsist aye and until the youngest of my children shall have attained to majority." The truster was survived by nine children, of whom two were sons. The youngest of his children, Elizabeth Mitchell, attained majority on 26th October 1879, and the residue of the estate fell to be distributed at that date under the third purpose of the settlement as quoted above. At that time there were alive of the truster's children two sons and three daughters. Of those daughters, one, Jane, who had married a Mr William Smith, was a widow with four children. The other two were unmarried. A question arose between the daughters and the trustees as to the payment to the former of their shares of the estate. The daughters maintained that as they were all either unmarried or widows at the date of division contemplated by their father's settlement, they were entitled to payment absolutely and immediately of their shares. The trustees, on the other hand, maintained that while the daughters were entitled to an immediate and absolute payment of one-third of their shares, they (the trustees) were bound, in accordance with the intention of the truster expressed in the third purpose of the settlement, to settle the remainder upon the daughters in liferent and the children of their marriage in fee, the *jus mariti* of any husbands they might marry being excluded therefrom.

This Special Case was therefore presented to the Court. The first parties were the trustees, the second parties the three daughters, and the children of Mrs Smith were the third parties.

The questions proposed to the Court were—

"(1) Whether the first parties are entitled and bound to make payment of the whole of their respective shares of the residue of the trust estate to (1st) Mrs Jane Mitchell or Smith, and (2d) Isabella Jane Mitchell and Elizabeth Mitchell, absolutely and on their own simple receipt? or (2) Whether they are bound to retain the said shares, or at least two-third parts thereof, and settle the same respectively by means of a trust, or in any other and what manner, upon (1st) the said Mrs Jane Mitchell or Smith in liferent allenarly, and the third parties and any other children Mrs Smith may have in fee, and (2d) the said Isabella Jane Mitchell and Elizabeth Mitchell in liferent allenarly, and their issue in fee—exclusive always of the *jus mariti* of any husbands they may marry."

Argued for the second parties—the daughters—The settlement was merely a direction to convey to parent in liferent and children in fee. That imported a fee in the parent. It was not a case of protected succession, like the cases of *Lady Massey* v. *Scott's Trustees*, Dec. 5, 1872, 11 Macph. 173; *Allan's Trustees* v. *Allan*, Dec. 12, 1872, 11 Macph. 216; *Gibson's Trustees* v. *Ross*, July 12, 1877, 4 R. 1038; *M'Nish* v. *Donald's Trustees*, Oct. 25, 1879, 7 R. 96. Here such protection would be of no avail. It was a case like *Houston Mitchell* v. *Mitchell*, Nov. 17, 1877, 5 R. 154. "Settle" imports only a direction to convey in certain terms. It does not entitle the trustees to do what they think the testator wished. A mere direction to settle will not entitle those so directed to make a new trust. *Ross* v. *King*, June 22, 1847, 3 Ross' L.C., L.R. 687; *Robertson* v. *D. of Athole*, Nov. 20, 1866, F.C., and M. App. *voce* Fiar, 1. The widow's position was different from that of the unmarried daughters. She might be entitled to one-third in fee and the liferent of the remaining two-thirds, with a fee to her children, while the unmarried daughters might have the fee of their shares.

Argued for the first parties—the trustees—It was sufficient that the testator intended his trustees to protect the succession. They were entitled to convey in such a manner as would do so. The same strictness is not enacted in a direction to trustees to convey as in a conveyance —*Seton*, March 6, 1793, M. 4219; *Dennistoun* v. *Dalgleish*, Nov. 22, 1838, 1 D. 69. In neither *Lady Massey's* case nor in *Gibson's* was the direction to settle on the daughter in liferent. The same was true of *Houston's* case. The cases of the widow and unmarried daughters were different. As to the argument that the widow having married before the period of distribution, would only be entitled to one-third of her share in fee and to the liferent of the rest, with the fee to her children, while the unmarried daughters took an immediate fee of the whole of their shares, it would be strange if it were held that the testator intended to apply a different rule to different daughters.

At advising—

Lord Gifford—In this case the testamentary trustees of the late James Mitchell of Auchinleck, who died on 31st October 1858, came to the Court along with certain beneficiaries for guidance as to the mode in which they are to carry out certain testamentary instructions of the testator. The estate is still in the hands of the trustees,

and has been so since the testator's death in 1858, and the question really is, What did the testator intend and direct the trustees to do in the circumstances which have emerged regarding the provisions made by the testator for his daughters? The question is one regarding the true intent and meaning of the testator, to be gathered from the words he employs in his trust-disposition and settlement.

The testator directed his trustees to retain the whole free residue of his estate for behoof of his whole children, in such proportions as he should appoint, and failing such appointment, for behoof of his whole children equally (the eldest son always receiving two shares)—"the share of each child to be payable at the first term of Whitsunday or Martinmas after the youngest of my children shall have attained majority." This makes the period of ultimate payment Martinmas 1879, the youngest child having attained majority on 26th October 1879. The deed then provides for the case of children predeceasing the said term of payment; and the testator proceeds thus —"And on the marriage of any of my daughters it is my wish that a sum not exceeding one-third of the estimated amount of their share of my estate shall be applied towards their outfit and establishment at the time, and that the remainder shall be settled upon themselves in liferent, and the children of their marriage in fee, the *jus mariti* of their husbands being excluded therefrom."

The only questions which have arisen under this clause relate to the shares destined to three of the truster's daughters, Mrs Jane Mitchell or Smith, widow of William Smith, Isabella Jane Mitchell and Elizabeth Mitchell, both of whom are unmarried. The question is as to the shares of these ladies—whether the trustees are bound now to pay the whole of them to the ladies themselves, or whether they are bound to retain the same or two-thirds thereof, and settle said two-thirds upon the ladies in liferent and the children of their respective marriages in fee, the *jus mariti* of their husbands being excluded?

I think there is a difference between the case of Mrs Smith, who I understand was married during the dependence of the trust, and the cases of Misses Isabella and Elizabeth Mitchell, who are still unmarried, but who have now survived the period for the ultimate decision and payment of the trust funds.

With regard to Mrs Smith, I am of opinion that the provision of the trust applies, and that the trustees are bound to settle two-thirds of her share upon herself in liferent and her children in fee, exclusive of the *jus mariti* of any husband to whom she may yet be married, and that by means of a trust or some other equally effectual manner. I think that the testator in directing her share to be settled upon herself in liferent and her children in fee, did not mean that the title should be taken in the final deeds of investment in these precise words, which if done would have the effect of giving Mrs Smith alone an absolute fee, leaving to her children merely a *spes successionis*, and which *spes successionis* Mrs Smith herself at her own hand and without the consent of her children might defeat at pleasure but that he meant the "settlement" to be such that Mrs Smith should not have the power to defeat the right of fee destined to her children, and that either by onerous or by gratuitous deeds. I think the testator used the words liferent and fee in their natural sense—that is, the sense which they bear when the liferenter and the fiar are strangers to each other—and not in the legal or conveyancing sense, which the words have been by a fiction of law construed to bear when the liferenter is a parent and the fiars are his or her children, in which case by a legal fiction and canon of construction the parent is held in law to be the full fiar. And accordingly I am of opinion that in any deed to be executed by the trustees of two-thirds of Mrs Smith's share, care must be taken to vest an indefeasible fee in her children—that is, a fee which cannot be defeated by the mere act of Mrs Smith herself. This may be done either by a trust or by the use of the words "liferent allenarly" in any proper and permanent deed of conveyance.

In regard to the two shares of Misses Isabella and Elizabeth Mitchell, I do not think that the truster meant his testamentary trust to subsist after the term of ultimate payment and division of the whole residue, or until the death or marriage of those daughters who might be unmarried at the term of final payment and division; and I do not think that he intended that the shares of daughters unmarried at the term of payment should be tied up by means of new trusts to meet the uncertain events of their marriages thereafter —events which might not take place at all. I am of opinion, therefore, that Isabella and Elizabeth Mitchell not having been married during the dependence of the trust, and the time having come for the final payment of their shares of the residue, the trustees are bound to pay these ladies themselves their full shares on their own discharge. I cannot read the testator's deed as containing instructions that this shall not be done. It would be proper, however, to insert in the discharges a declaration that the money is accepted under all the conditions contained in the trust-deed as to the interest of the children of any future marriage of the legatees, and as to the exclusion of any husband to whom the legatees may hereafter be married. I think this is all the trustees can do under the terms of Mr Mitchell's trust-deed.

Lord Young—By the third purpose of the will the residue is appointed to be retained by the trustee for behoof of the testator's children in certain shares—"the shares of each to be payable at the first term of Whitsunday or Martinmas after the youngest of my children shall have attained majority," which was, as it happened, Martinmas 1879. At that time two of the daughters—Isabella Jane and Elizabeth—were unmarried, and they still are so, and I am of opinion that they are entitled to payment of their shares.

With respect to the other surviving daughter, Jane (Mrs Smith), the case stands otherwise, for she was married during the trust, but before the arrival of the general term of payment, so that her case comes under a qualifying declaration which merely follows the general provision as to payment which I have cited—"It being declared that" "on the marriage of any of my daughters it is my wish that a sum not exceeding one-third of the estimated amount of their share of my estate shall be applied towards their outfit and establishment at the time, and that the remainder

shall be settled upon themselves in liferent and the children of their marriage in fee."

I think the trustees ought to have executed and fulfilled the testator's "writ" thus expressed on the occasion of Jane's marriage, and that she was entitled to demand fulfilment then without waiting the arrival of the general term of payment. This, however, was not done, and Mrs Smith (Jane) now asks that the whole capital of her share shall be paid to herself. She is a widow with four children, and the trustees contend that she is entitled to payment of one-third only of her share, the remaining two-thirds being settled so as to give her the liferent only and secure the fee to her children.

I am of opinion that this contention of the trustees is right.

The case is important as illustrating a distinction between wills and deeds of conveyance with respect to the construction and effect of technical words and expressions. When a man is his own conveyance, as it has been quaintly expressed—meaning when he himself conveys his property directly to the persons he means to favour—any technical expressions shall have their strict technical meaning and effect, and no other, unless it appears clearly from the context or other part of the deed that they were used in another sense. But in a will, where the testator does not convey to the parties he means to favour, but to executors or trustees to whom he expresses his wishes, leaving them to do what may be necessary to accomplish them or carry them into execution, the general rule is that any technical words occurring in the expression of will or wish shall be construed with reference and in subservience to the intention of the testator to be collected from the whole instrument, and that it is the duty of the trustees or other executors of the will to do what will be legally efficacious to fulfil the intention. When, indeed, a testator directs his trustees to make a conveyance in specified terms, the direction must be exactly obeyed, and the conveyance when made will be construed and have effect according to the same rules that would have applied to it if made by the testator himself. The distinction between a will and a conveyance in the respect I refer to is really in the greater scope the former affords for ascertaining intention satisfactorily and safely, for I admit that a mere conjecture that technical words, even probably intended in a popular sense, is not allowable in either case.

There is here no doubt whatever about the testator's intention—that is, about the meaning of the wish which he expressed and desired his trustees to do what should be legally necessary to accomplish "on the marriage of any of my daughters," and he assumedly did not intend that his trustees should so act as to frustrate it or take no account of it at all. But the argument for Mrs Smith really was that no account should be taken of it, and that she should have the capital of her share paid to her exactly as if no such wish had been expressed or direction given. To this I cannot assent. I think the wish is lawful, sufficiently expressed, and legally capable of fulfilment, and I am of opinion that it is the duty of the trustees to fulfil it accordingly. Exact fulfilment is now indeed impossible, for the marriage of this daughter is so distinctly a past event that she is now a widow with four children. We have, however, to consider what ought to have been done on her marriage, and such consideration is the ground of the argument in support of her claim. The argument is, that had the trustees on her marriage settled two-thirds of her provision on her in liferent and her then unborn children in fee, they might as well have saved themselves the trouble and paid over the money to her, as that would have been the legal effect of a settlement in these terms, and that they ought therefore just to hand over the money to her now. But I think it clear that the testator meant to distinguish between one-third and the remaining two-thirds, intending that the former should be paid to her or applied towards her outfit and establishment, and that the latter should be withheld from her, and so settled that she should have the liferent only, and that the capital should be secured to her children, not generally, but of that marriage. This intention I am of opinion that the trustees were bound to execute, which assuredly they would not have done by paying the whole to her, or paying her a third and so settling the remainder as to be exactly equivalent to paying that to her also. The marriage is now dissolved, with four children born of it, and the duty of the trustees, in my opinion, is so to settle two-thirds of the provision that the widow shall have the life interest and those four children the fee. There is no difficulty whatever in accomplishing the testator's clear, and indeed admitted, intention to this effect. To say that a testator's intention is clear, lawful, and capable of execution, but that his executors or trustees are nevertheless bound or at liberty to frustrate it, is in my opinion, extravagant.

Lord Ormidale concurred, and intimated that the Lord Justice-Clerk, who was absent, also concurred.

The Court answered the first question affirmatively as regarded the shares of Isabella Jane Mitchell and Elizabeth Mitchell; and with reference to the second question, found that the first parties are bound to retain two-third parts of the share effeiring to Mrs Jane Mitchell or Smith, and to settle the same by means of a trust or by means of a permanent investment upon the said Mrs Jane Mitchell or Smith in liferent allenarly, and the third parties and any other children she may have in fee, the remaining one-third being paid to Mrs Smith absolutely, and decerned.

Counsel for First Parties — Keir. Agents—Lindsay, Howe, Tytler, & Co., W.S.

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